

LEGAL GUIDANCE

HIV-INFECTED HEALTH CARE WORKERS

The scope of protection for HIV-infected healthcare workers under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 continues to be a major concern with hospitals and the courts. Hospital officials often find themselves in a very difficult position. They must not discriminate against seropositive healthcare workers and many states have laws that require information as to a person's HIV status to be held in strict confidence. At the same time, they need to safeguard both co-workers and patients from harm and, of course, they need to minimize the potential for institutional liability that would result if an infected healthcare worker transmitted the infection to others while on duty. Briefly summarized here is a case involving the termination of a HIV-positive physician from a neurosurgical residency program at the University of Maryland. *John Doe v. Univ. of Maryland Medical System Corporation*, 50 F.3d 1261 (4th Cir. 1995).

The Federal Fourth Circuit Court of Appeals has held that a university hospital did not violate Section 504 of the Rehabilitation Act or Title II of the Americans with Disabilities Act (ADA) (covering public entities) when it removed the HIV-positive physician from a neurosurgical residency program based upon the risk of transmission of the disease during performance of exposure-prone surgical procedures, i.e., those posing risk of percutaneous (skin-piercing) injury.

The university had offered the physician alternative residencies in non-surgical fields. Arguing that the university had discriminated

against him by refusing to recognize that any risk that he posed to the health or safety of patients could be eliminated by reasonable accommodations, the physician brought legal action under a variety of state and federal laws, including the ADA and Section 504 of the Rehabilitation Act.

The Court acknowledged that the risk of HIV transmission to patients by the doctor might be very low. However, it deferred to the university's determination that almost all of the neurosurgical procedures that would have been performed by Dr. Doe were within the Centers for Disease Control (CDC) definition as "exposure prone." The CDC recommends that HIV-positive physicians be prevented from performing them. While the Court observed that there is, to date, no documented case of an HIV-positive surgeon transmitting the virus to a patient, it also noted that such transmission clearly is a possibility and the results are invariably fatal. It found that the doctor posed "a significant risk to the health and safety of his patients that cannot be eliminated by reasonable accommodation." Accordingly, this physician was not an otherwise qualified individual with a disability under these statutes.

Of particular interest to the Court, and significant for healthcare facilities confronting similar problems, was the fact that the university's decision for termination of Dr. Doe had been "thoroughly deliberated." The university made their decision based on the best interests of protecting its patients.

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